

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling to Clarify)	WC Docket No. 11-118
47 U.S.C. § 572 in the Context of Transactions)	
Between Competitive Local Exchange Carriers)	
and Cable Operators)	
)	
Conditional Petition for Forbearance from Section)	
652 of the Communications Act for Transactions)	
Between Competitive Local Exchange Carriers and)	
Cable Operators)	

COMMENTS OF COMPTTEL

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TABLE OF CONTENTS

	<u>Page</u>
I. Introduction and Summary	2
II. The Plain Language of Section 652 Excludes Local Exchange Carriers That Were Not Providing Service On January 1, 1993	4
III. The Need For Clarification	6
IV. In the Absence of the Requested Clarification, the Commission Must Grant NCTA's Conditional Petition for Forbearance	11
V. At the Very Least, the Commission Must Define the Bases For Disapproval	12
Conclusion	13

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COMPTTEL, through undersigned counsel, hereby supports the above-captioned Petition for Declaratory Ruling and Conditional Petition for Forbearance filed by the National Cable & Telecommunications Association (“NCTA”) to clarify the reach and scope of Section 652 of the Communications Act, 47 U.S.C. §572. NCTA demonstrated that the Commission has authority pursuant to the Administrative Procedure Act, 5 U.S.C. §554(e), and Section 1.2 of its own rules, 47 C.F.R. §51.2, to issue a declaratory ruling to remove uncertainty.¹ The Commission’s handling of two recent transactions² has created ambiguity and uncertainty with respect to the applicability of Section 652 to transactions involving cable companies and competitive local

¹ NCTA Declaratory Ruling Petition at 5-6.

² See, *In the Matter of Applications Filed for the Acquisition of Certain Assets of CIMCO Communications, Inc. by Comcast Phone LLC, Comcast Phone of Michigan LLC and Comcast Business Communications, LLC*, WC Docket No. 09-193, Memorandum Opinion and Order and Order on Reconsideration, FCC 10-41 (rel. Mar. 15, 2010) (“*CIMCO Decision*”); FCC Public Notice, *Applications Granted For The Transfer Of Control Of FiberNet From One Communications Corp. To NTELOS, Inc.*, WC Docket No. 10-158, DA 10-2252, 25 FCC Rcd 16304 (rel. Nov. 29, 2010) (“*FiberNet Decision*”).

exchange carriers (“CLECs”) that were not providing telephone exchange service as of January 1, 1993 and that ambiguity and uncertainty needs to be resolved lest it continue to serve as a deterrent to efficient and pro-competitive business combinations.

I. Introduction and Summary

Section 652 was adopted as part of the Telecommunications Act of 1996. The Telecommunications Act also repealed former Section 613(b) of the Communications Act which had prohibited a common carrier from providing video programming directly to subscribers in its telephone service area.³ Section 652(a) prohibits local exchange carriers or their affiliates from purchasing or otherwise acquiring “more than a 10 percent financial interest, or any management interest, in any cable operator providing cable service within the local exchange carrier’s telephone service area” and Section 652(b) prohibits cable operators and their affiliates from purchasing or otherwise acquiring “more than a 10 percent financial interest, or any management interest, in any local exchange carrier providing telephone exchange service within such cable operator’s franchise area.” Section 652(e) defines the term critical to the resolution of NCTA’s declaratory ruling petition. That section states that “[f]or purposes of this section, the term ‘telephone service area’ . . . means the area within which such carrier provided telephone exchange service *as of January 1, 1993*. . . . (Emphasis added.) The Commission may waive the buy out prohibitions in Sections 652(a) and 652(b) if, and only if, certain conditions are met

³ *In the Matter of the Applications of Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee, For Consent To Transfer Control of Pacific Telesis Group and Its Subsidiaries*, 12 FCC Rcd 2624 at ¶ 563, n. 1076 (1997); *In the Matter of US West, Inc. and Continental Cablevision, Inc.*, 11 FCC Rcd 13260 at ¶9 and n. 30 (1996).

and the local franchising authorities in any overlap areas⁴ approve of the waiver. Section 652(d)(6) of the Act, 47 U.S.C. § 572 (d)(6).

NCTA has persuasively argued that Section 652 was intended to restrict the ability of *incumbent* telephone companies and incumbent cable operators to acquire interests in one another and by doing so eliminate the availability of an alternative last mile access to end users. It was not intended to bar cable operators and competitive LECs from acquiring one another.⁵ NCTA's interpretation is strongly supported by the statutory definition of "telephone service area" in Section 652(e) which limits the definition of the prohibited overlap areas to areas within which a local exchange carrier was providing local telephone service on January 1, 1993, three years before the Telecommunications Act was passed. Because CLECs were not able to obtain the interconnection agreements with incumbent local exchange carriers that they need to provide local exchange service until after the Telecommunications Act was passed in 1996, it is highly unlikely that any CLEC was providing local exchange service in a "telephone service area" three years before the Act was passed.

If the Commission declines to clarify that Section 652 does not prohibit purchases and other acquisitions between cable operators and local exchange carriers that were not providing service on January 1, 1993, it should grant NCTA's conditional petition to forbear from enforcing Section 652 in the context of transactions between cable operators and such local exchange carriers. If the Commission also declines to grant forbearance, it must at a very

⁴ The buy out prohibitions of section 652 are triggered only where the local exchange carrier's telephone service area overlaps with the cable operator's franchise area. *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T, Transferee*, 14 FCC Rcd 3160 at ¶133 (1999) ("AT&T/TCI Decision").

⁵ NCTA Petition at 6-11.

minimum, limit the bases on which a local franchising authority may disapprove a waiver to those enumerated in Section 652(d)(6)(A).

II. The Plain Language of Section 652 Excludes Local Exchange Carriers That Were Not Providing Service On January 1, 1993

“In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue. . . inquiry into the statute’s meaning is finished.” *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1997). Fifteen years ago, the Commission determined that Section 652 spoke with such clarity that it incorporated the statutory language verbatim into its rules,⁶ explaining that “[m]uch of the 1996 Act consists of clear, self-effectuating revisions to prior federal statutory provisions.”⁷

It is also well settled that every clause and word of a statute must be given effect, *U.S. v. Menasche*, 348 U.S. 528, 538-39 (1955). For that reason, the Commission cannot ignore the time restriction that the statute places on the definition of telephone service area. The plain language of the Act clearly does not prohibit a local exchange carrier that was not providing service in January 1993 from purchasing or otherwise acquiring a cable operator providing service within that carrier’s telephone service area because such a carrier does not have a “telephone service area” as defined by the statute.⁸ Nor does the plain language prohibit a cable operator from purchasing or otherwise acquiring a local exchange carrier that was not providing service in January 1993 in a telephone service area that overlaps the cable operator’s franchise area because such a carrier does not have a “telephone service area” as defined by the statute.⁹

⁶ See 47 C.F.R. §76.505.

⁷ 61 F.R.18968 at 18969, ¶3 (Apr. 30, 1996).

⁸ *AT&T/TCI Decision* at ¶136.

⁹ *Id.*

To interpret the Section 652(a) and Section 652(b) buy out prohibitions to apply equally to transactions between cable operators and CLECs that were not providing local exchange service in January 1993 and cable operators and ILECs that were providing such service in January 1993 would impermissibly disregard the statutory definition of “telephone service area” found in Section 652(e). *See, Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990) (“Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.”) Such an interpretation would also inappropriately broaden the reach of the buy out prohibitions in a manner not intended by Congress.

In addition to the plain language of Section 652(e), the text of the following section of the Act lends further support to the proposition that Congress did not intend for the buy out prohibitions to apply to transactions between CLECs and cable operators. Section 653 of the Act, 47 U.S.C. §573, defines “telephone service area” for purposes of the open video system provision. The definition of “telephone service area” in Section 653 is far different and much broader than the definition of “telephone service area” in Section 652. Section 653 authorizes a local exchange carrier to provide cable service to cable subscribers in its “telephone service area” through an open video system. Section 653(d) defines “telephone service area” for purposes of that section as “the area within which such carrier is offering telephone exchange service.” Unlike Section 652(e), Section 653(d) does not limit the definition of “telephone service area” by incorporating a date certain on which such service must have been offered. In other words, while Congress authorized all local exchange carriers to provide cable service via an open video system in their telephone service areas, it prohibited only those carriers that were providing local exchange service as of January 1, 1993 from acquiring or being acquired by a cable operator

with an overlapping franchise area. The qualifying language in Section 652(e) significantly narrows the class of local exchange carriers that are subject to the buy out prohibition. The Commission must read the statute in a manner consistent with the plainly articulated intent of Congress and clarify that the buy out prohibitions apply only to transactions with cable operators and local exchange carriers providing telephone exchange service as of January 1, 1993.

III. The Need For Clarification

Unfortunately, the Commission's decisions approving the CIMCO and Fibernet transactions have created ambiguity with respect to the Commission's interpretation and application of the statute. Before those decisions, it appears that the Commission appropriately had read Section 652 narrowly and had ruled that it did not apply to transactions between cable operators and local exchange carriers that were not providing service in any overlap areas on January 1, 1993. For example, the Commission found that Section 652(a) did not bar AT&T from acquiring cable system operator TCI because Teleport, an AT&T CLEC subsidiary, was not providing local exchange service as of January 1, 1993 in any areas served by TCI's cable systems:

[A]lthough as of January 1, 1993, Teleport provided service in areas which overlap with TCI's, or a TCI affiliate's cable franchise area (*i.e.*, Boston, San Francisco, Los Angeles, Chicago, Dallas, Houston, Brooklyn, Nassau County, and Newark), Teleport was not providing the type of service -- *i.e.*, telephone exchange service -- in those areas that would trigger the buy out restriction set forth in section 652. Section 652(a) prohibits local exchange carriers from acquiring more than a 10% financial interest in any cable operator within the local exchange carrier's "telephone service area." The term "telephone service area" is defined as the area within which a common carrier provided "telephone exchange service" as of January 1, 1993.

Because we find that Teleport was not providing "telephone exchange service" as of January 1, 1993 in the overlap areas, Teleport, by definition, did not have a "telephone service area" within the meaning of the statute. Accordingly, since Teleport does not have

a "telephone service area" for purposes of the section 652(a) buy out prohibition, the statutory restriction does not apply to the instant proceeding.¹⁰

Similarly, the Commission approved the combination of Comcast Corporation and AT&T Broadband, AT&T's cable television/telephony subsidiary, after finding that the merger would not violate Section 652 because neither Comcast nor AT&T Broadband provided "telephone exchange service" in any overlapping areas.¹¹ Significantly, the decision does not discuss the local exchange operations attributable to the AT&T parent corporation. Pursuant to the terms of the merger, AT&T Broadband was to be spun off to its shareholders and then merged with Comcast into AT&T Comcast and the Chairman and CEO of AT&T was to become the Chairman of AT&T Comcast.¹² Because of the management position in the merged entity held by the Chairman and CEO of AT&T,¹³ the Commission would have had to determine whether there was any overlap of AT&T's local exchange operations and Comcast's cable service areas if the Commission had read Section 652 to prohibit transactions between cable

¹⁰ *AT&T/TCI Decision* at ¶¶134, 136.

¹¹ *In the Matter of Applications For Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, MB Docket No. 02-70, Memorandum Opinion and Order, FCC 02-310 at ¶ 168 (rel. Nov. 14, 2002) ("*Comcast/AT&T Decision*"). The Commission cited a filing by the Applicants in which they asserted that the buy out prohibition "only applies to those overlapping cable/LEC systems where the LEC or its affiliate was providing telephone exchange service as of January 1, 1993. The telephone exchange services affiliated with Comcast and AT&T Broadband began operation after this date. The prohibition therefore would not apply to the AT&T Comcast merger even assuming the two companies had overlapping cable/LEC systems." See June 28, 2002 letter from A. Renee Callahan to Marlene H. Dortch filed in MB Docket No. 02-70.

¹² *Comcast/AT&T Decision* at n. 578.

¹³ As noted, Section 652(a) prohibits a local exchange carrier from acquiring more than a 10 percent ownership interest or any management interest in any cable operator providing cable service within the local exchange carrier's "telephone service area."

operators and local exchange carriers, regardless of whether the local exchange carriers had “telephone service areas” within the meaning of the statute.

Further evidence of the Commission’s narrow interpretation of Section 652 may be found in the decision approving SBC’s acquisition of Ameritech. *In re Applications of Ameritech Corp., Transferor and SBC Communications, Inc., Transferee*, CC Docket No. 98-141, Memorandum Opinion and Order, FCC 99-279 (rel. Oct. 8, 1999). Ameritech, an incumbent LEC, had overbuilt cable systems in its telephone service area. Through the acquisition, SBC would obtain control of cable systems and an ILEC with overlapping service areas. The Commission, however, determined that Section 652 did not prohibit the acquisition:

We conclude that section 652 is not applicable to the proposed transaction. Ameritech, as an incumbent LEC, has begun overbuilding incumbent cable operators in its telephone service region. SBC, as the acquiring incumbent LEC, would not be acquiring the local cable operator in these areas, but simply would stand in Ameritech’s shoes as an incumbent LEC offering competing service. Congress was not opposed to the provision of cable service by a LEC, Congress simply did not want that provision of service to occur by the acquisition of the local cable operator. . . . Ameritech has built its own cable systems. The merged entity will continue to own those same cable systems. SBC acquires Ameritech’s cable overbuilds as part of the very same transaction in which SBC’s telephone service area expands to include Ameritech’s local exchange carrier operations. Accordingly, SBC is not making a purchase or acquisition of a cable operator that would constitute a prohibited buyout under Section 652.

Id. at ¶564. Clearly, the Commission focused on the competitive nature of the cable service that the ILEC was acquiring as exempting the transaction from the buy out prohibitions of Section 652. The Commission’s reasoning compels the conclusion that Section 652 also does not prohibit a cable operator from purchasing or acquiring a CLEC offering competitive local exchange service in the cable operator’s local franchise area.

The Commission’s interpretation of the statute became muddled in the decisions approving the CIMCO and FiberNet acquisitions. In the CIMCO transaction, Comcast acquired a CLEC that did not provide local exchange service in January 1993 and therefore did not have a

“telephone service area” within the meaning of the statute that overlapped any Comcast cable franchise area. Nonetheless, the applicants asked the Commission to waive the buy out prohibition pursuant to Section 652(d)(6) without deciding whether the buy out prohibition actually applied to the transaction.¹⁴ The Commission noted that “[t]here appears to be no prior instance where an applicant has sought such a waiver from the Commission.”¹⁵ Consistent with the applicants’ request, the Commission processed the waiver. Because one local franchising authority – the City of Detroit -- objected to the waiver, the Commission approved the assignment and transfer of control and granted a waiver of Section 652(b) except as to the CIMCO assets located in the Detroit, Michigan local cable franchise area.¹⁶

Eight months later, the Wireline Competition and International Bureaus approved, pursuant to delegated authority, the transfer of control of FiberNet, a CLEC providing local exchange service in West Virginia, to NTELOS, a wireline and wireless service provider operating in Virginia and West Virginia.¹⁷ A private investment firm held equity interests in both NTELOS and Suddenlink, a cable operator providing service in Virginia and West Virginia.

¹⁴ FCC Public Notice, “*Application Filed for the Acquisition of Certain Assets and Authorizations of CIMCO Communications, Inc. by Comcast Phone LLC, Comcast Phone of Michigan, LLC and Comcast Business Communications, LLC*,” WC Docket No. 09-183, FCC 09-104 at n. 6 (rel. Dec. 1, 2009); *CIMCO Decision* at ¶13, n. 34.

¹⁵ *CIMCO Decision* at ¶13. In fact, a cable operator requested a waiver of Section 652(b) in order to provide local exchange service in its cable franchise area shortly after the Telecommunications Act was passed. *In the Matter of SouthEast Telephone, Ltd. Petition For Waiver of Section 652 Prohibition on Buy Outs of the Telecommunications Act of 1934*, 12 FCC Rcd 2561 (CSB 1996). In that case, the Cable Bureau determined that the buy out prohibitions of Section 652(b) did not apply because the cable operator was not purchasing or otherwise acquiring an incumbent local exchange carrier and dismissed the petition for waiver. *Id.* at ¶¶ 7-10.

¹⁶ *Id.* at ¶¶ 41-44.

¹⁷ *FiberNet Decision*, 25 FCC Rcd at 16304.

The applicants alleged that the buy out provisions of Section 652 were triggered because FiberNet provided local exchange service in certain Suddenlink franchise areas and they requested a waiver of those provisions pursuant to Section 652(d)(6).¹⁸ The Bureaus apparently agreed that the transaction triggered the buy out prohibitions due to the overlapping service areas, noting that “Section 652(b) is applicable to this transaction because of [the investment firm’s] holdings in both NTELOS and Suddenlink.” After receiving no expressions of disapproval from any of the local franchising authorities, the Commission granted the waiver of Section 652(b).¹⁹ The decision contains no discussion of the statutory definition of “telephone service area” or whether FiberNet provided local exchange service as of January 1, 1993 in any of the overlap areas.

Whether or not the Commission so intended, the *CIMCO and FiberNet* decisions could be read to mean that the Commission has altered its interpretation of the buy out prohibitions of Section 652 and no longer believes that the Section 652(e) definition of “telephone service area” limits the class of local exchange carriers to which the statute applies. As discussed above, such an interpretation is unsustainable and inconsistent with the plain language of the statute. In an effort to avoid continued uncertainty about the Commission’s interpretation of the statute and the market uncertainty that it causes, the Commission should issue without delay a ruling clarifying that Section 652(a) and Section 652(b) do not prohibit purchases or other acquisition transactions between cable operators and local exchange carriers that were not providing telephone exchange service on January 1, 1993.

¹⁸ See Joint Domestic and International Application and Request For Waiver filed in WC Docket No. 10-158 on August 2, 2010 at 13.

¹⁹ *FiberNet Decision* , 25 FCC Rcd at 16306-07.

IV. In The Absence of the Requested Clarification, The Commission Must Grant NCTA's Conditional Petition For Forbearance

In the event that the Commission concludes that Section 652 does prohibit purchases and other acquisitions between cable operators and local exchange carriers that were not providing service on January 1, 1993, NCTA asks the Commission to forbear from enforcing Section 652 in the context of such transactions or at the very least to forbear from enforcing the local franchise authority approval provision in Section 652(d)(6)(B).²⁰ As noted above, COMPTTEL submits that the plain language of Section 652 precludes the Commission from applying the buy out prohibitions to transactions between cable operators and local exchange carriers that were not providing service on January 1, 1993. Nonetheless, if the Commission were to ignore the statutory definition of “telephone service area” in Section 652(e) and reach a contrary conclusion or simply decline to act on NCTA’s Petition For Declaratory Ruling, COMPTTEL urges the Commission to grant NCTA’s request that the Commission forbear from enforcing the buy out provisions to transactions between cable operators and CLECs pursuant to Section 10 of the Act, 47 U.S.C. §160. NCTA demonstrated that in the context of transactions between cable operators and CLEC providers, both of which are nondominant in the provision of telecommunications services, enforcement of Section 652 is not necessary to ensure that the charges, practices, classifications or regulations by, for or in connection with the provision of telecommunications services are just, reasonable and not unjustly or unreasonably discriminatory; that enforcement is not necessary to protect consumers; and that forbearance is consistent with the public interest.²¹ Under such circumstances, Section 10 mandates that the Commission grant forbearance.²²

²⁰ NCTA Conditional Petition For Forbearance.

²¹ *Id.* at 7-12.

V. At the Very Least, the Commission Must Define the Bases For Disapproval

If the Commission were to interpret Section 652 as prohibiting the purchase or acquisition of a competitive local exchange carrier by a cable operator and deny NCTA's Conditional Petition for Forbearance of enforcement of the Section to transactions between cable operators and CLECs, NCTA asks in the alternative that the Commission establish some standards and procedures to give structure to the local franchising authority approval process.²³ Section 652(d)(6)(B) and the Commission's implementing regulation, 47 C.F.R. § 76.505(d)(6)(ii), provide that the Commission may grant a waiver of the buy out prohibitions only with the approval of the local franchising authority. As NCTA points out, with no standards governing the basis for approval or disapproval, this provision effectively gives local franchising authorities unreviewable veto authority over a cable operator's acquisition of a competitive local exchange carrier²⁴ even where the Commission finds that a waiver would serve the public interest as happened in the CIMCO transaction. Because Congress was very explicit that local franchising authorities have no jurisdiction over either the cable operator's²⁵ or the CLEC's telephone exchange services, affording a local franchising authority unrestrained discretion to block a cable/CLEC transaction is inconsistent with other provisions of the Act.

In Section 652(d)(6)(A), Congress set forth the determinations the Commission must make before granting a waiver of the buy out prohibitions. Those determinations should also guide the approval process for local franchising authorities. One of those determinations – that

²² 47 U.S.C. §160(a).

²³ NCTA Petition For Declaratory Ruling at 14-24.

²⁴ *Id.* at 14-22.

²⁵ *See* Section 621(b)(3) of the Act, 47 U.S.C. §541(b)(3).

any anticompetitive effects of the transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served – is broad enough to encompass any legitimate concerns the local franchising authority may have with a cable/CLEC combination. Requiring local franchising authorities to limit their objections to any request for a waiver of the buy out prohibitions to areas covered by the statutory criteria would at least provide applicants with notice of the showing they are required to make to obtain a waiver and would properly constrain the bases for local franchising authority disapproval.

COMPTEL also supports NCTA's request that the Commission limit the time in which local franchising authorities may notify the Commission of their disapproval of waiver requests.²⁶ The Commission established a 60 day period for local franchise authorities to weigh in on both the CIMCO and FiberNet waivers and that provided plenty of time for the authorities to review the record at the Commission and register their approval or disapproval. If the local franchise authority fails to notify the Commission of any objection to the waiver within that prescribed time period, it should be deemed to have waived its right to object.

CONCLUSION

For the foregoing reasons and those stated in the NCTA Petitions, the Commission should clarify that the Section 652 buy out prohibitions do not apply to transactions involving cable operators and CLECs that were not providing local exchange service in any overlap areas on January 1, 1993. In the alternative, the Commission should grant forbearance from enforcement of the buy out prohibitions to transactions involving cable operators and CLECs. If

²⁶ NCTA Petition For Declaratory Ruling at 22-23.

the Commission elects neither of these options, it should at the very least limit the grounds on which a local franchising authority may object to a waiver of the buy out prohibitions to those set forth in the statute and establish a time period in which local franchising authorities must notify the Commission of their approval or disapproval of the waiver.

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